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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 5.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ESTATE OF FRANCOIS L. CHURCH, Deceased,
EDWARD E. BLOCK, Executor,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* ON *STARE DECISIS* AND MAY *v.* HEINER

HUGH SATTERLEE,
ROLLIN BROWNE,
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Amici Curiae.

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This brief, by permission of the Court and with the written consent of counsel for both parties, is filed by the undersigned as *amici curiae* on behalf of the Estate of George W. B. Roberts, deceased, against which an estate tax liability has been asserted on account of an alleged reverter interest "by operation of law" in an *inter vivos* transfer made by the decedent prior to March 3, 1931, in which he reserved a life estate.

Our argument will be directed to questions numbered 3, 4, 5 and 7 on which the Court requested reargument in its order of June 21, 1948. Those are the questions relating to the reservation of a life estate by the decedent and the continued authority of the Court's holdings in *May* v. *Heiner*, 281 U. S. 238, and *Hassett* v. *Welch*, 303 U. S. 303, in view of the later decision in *Helvering* v. *Hallock*, 309 U. S. 106.

SUMMARY OF ARGUMENT

The Court has asked whether it should adhere to the rule of *May* v. *Heiner*, a rule first adopted by unanimous decision of the Court in 1930, after previously having been forecast by other respectable authority; reaffirmed unanimously in 1931 after most mature reconsideration by *per curiam* decisions in three additional cases; accepted and followed, by necessary implication, in 1935, in still another unanimous decision of the Court; admittedly brought to the specific attention of Congress and expressly declared on the floor of Congress to be accepted as to past transactions, although being at the same time altered as to the future; accepted and followed in a long line of Treasury decisions; relied on by individuals in making dispositions of their property or in retaining in dispositions already made interests which this Court and the Treasury had assured them repeatedly they might retain without tax consequences; a rule resting on a reasonable and logical basis, and not in conflict with anything theretofore or thereafter decided by this Court.

It is now too late to overturn a rule thus adopted, reaffirmed, accepted and relied on for eighteen years.

ARGUMENT.

If the rule of *Stare Decisis* has any remaining vitality, it requires reaffirmance of May *v.* Heiner.

We base our argument on Mr. Justice Frankfurter's statement of the guiding principles to be followed in applying the rule of stare decisis, as set forth in his opinion in the *Hallock* case, 309 U. S. at pp. 119-121, which, for the convenience of the Court, we quote at some length:

> "We recognize that stare decisis embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But stare decisis is a principle of policy and not a mechanical formula of adherence to the *latest decision, however recent and questionable*, when such adherence involves *collision with a prior doctrine* more embracing in its scope, intrinsically sounder, and verified by experience.
>
> "Nor have we in the St. Louis Union Trust Co. Cases rules of decision around which, by the accretion of time and the response of affairs, substantial interests have established themselves. * * * *We have not before us interests created or maintained in reliance on those cases.* * * *
>
> "Nor does want of specific congressional repudiations of the St. Louis Union Trust Co. Cases serve as an *implied* instruction by Congress to us not to reconsider, in the light of new experience, whether those decisions, in conjunction with the Klein case, make for dissonance of doctrine. It would require very persuasive circumstances enveloping congressional *silence* to debar this Court from re-examining its own doctrines. To explain the cause of *non-action* by Congress *when Congress itself sheds no light* is to

venture into speculative unreality. *Congress may not have had its attention directed to an undesirable decision; and there is no indication that as to the St. Louis Union Trust Co. Cases it had,* even by any bill that found its way into a committee pigeonhole. Congress may not have had its attention so directed for any number of reasons that may have moved the Treasury to stay its hand. But certainly such *inaction* by the Treasury can hardly operate as a controlling administrative practice, through acquiescence, tantamount to an estoppel barring reexamination by this Court *of distinctions* which it had drawn. Various considerations of parliamentary tactics and strategy might be suggested as reasons for *the inaction of the Treasury and of Congress,* but they would only be sufficient to indicate that we walk on quicksand when we try to find *in the absence of corrective* legislation a controlling legal principle.

"* * * Whatever else may be said about *want of congressional action* to modify by legislation the result in the St. Louis Union Trust Co. Cases, it will hardly be urged that the reason was congressional approval *of those distinctions* between the St. Louis Union Trust Co. and the Klein Cases *to which four members of this Court could not give assent.* By imputing to Congress *a hypothetical recognition* of coherence between the Klein and the St. Louis Union Trust Co. Cases, we cannot evade our own responsibility for reconsidering, in the light of further experience, the validity *of distinctions* which this Court has itself created. *'Our problem then is not that of rejecting a settled statutory construction. The real problem is whether a principle shall prevail over its later misapplications.'* (Emphasis supplied.)

Almost every line of that statement by negative inference requires that this Court now adhere to its former decision in *May* v. *Heiner.*

The Court is *not* here confronted, as it was in the *Hallock* case, with merely a recent divergence by a bare majority of the Court from an unquestioned rule previously laid down by unanimous decision of the Court.

We do *not* have here, as in the *Hallock* case, a mere implied acceptance of the prior rule by Congress, possibly due to the rule not having been called to its attention, or mere inaction by the Treasury claimed to constitute acquiescence in the rule.

The Court *is* here confronted with a situation in which without question interests were created or maintained in reliance on the rule now brought into question.[1]

We shall not attempt to re-examine minutely, or give a new all-inclusive definition of, the phrase, "take effect in possession or enjoyment", contained in Section 302(c) of the estate tax law. Suffice it to say that almost from the beginning it was recognized that the phrase contained a possible ambiguity. In 1922, in *Levy* v. *Wardell*, 258 U. S. 542, this Court, considering certain transfers in which the transferor had reserved a life interest, said that they were "not in contemplation of, or intended to take effect in possession or enjoyment at or after her death" and that "all of the transfers were intended to take effect in possession and enjoyment upon their date". But the opinions of Judge Hough and Judge Learned Hand in *Frew* v. *Bowers*, 12 F. (2d) 625, decided in 1926, show there were conflicting views as to the proper interpretation of the phrase.

Judge Hough pointed out that it was the natural inclination of every lawyer to recognize that the words "take ef-

[1] For cases involving similar transfers made after the decision in *May* v. *Heiner* but before the adoption of the joint resolution of March 3, 1931, see *Brewer* v. *Hassett*, 49 Fed. Supp. 501; *Smith* v. *United States*, 16 Fed. Supp. 397; *Estate of Rosenwasser* v. *Commissioner*, 5 T. C. 1043.

fect'' were not a phrase of art, and to search for some ''artistic equivalent'' and to find it in the word ''vest''. According to that school of thought, if a transfer immediately vests out of the transferor, ''the transaction is complete, and the grantor or transferor has no 'interest' left therein''.

On the other hand, Judge Hough said, there were those who ''look only to what Congress is supposed to have wanted, i. e., to collect the largest quantum of tax and so read 'possession' and particularly 'enjoyment' as meaning the time when remaindermen and/or reversioners will obtain the usufruct of the property''.

Judge Hough said that the decisions up until then were hopelessly at variance, but he concluded that ''the ruling decisions seem to us to go no further than to definitely hold that a trust creation, wherein the possession or enjoyment in the usufruct sense is deferred until 'at or after' the death of the settlor, is a 'completed' transaction, a holding consistent only with the more technical and legal interpretation of the statutory words''.

Accordingly, it was held that the settlor had no taxable interest in the property at the time of his death, in spite of the fact that he had retained ''a life interest in the net income'', which was considered ''not relevant to this tax''.

Judge Hand, writing a special concurring opinion, said that '' 'possession or enjoyment' appears to be a phrase clearly intended to refer to the period when the remainders 'fall in', not to that at which they 'vest' '', but he concurred on the ground that the statute was unconstitutional as applied to this particular transfer, which was made long prior to its enactment, thus conceding that the transfer was complete when made, despite the reservation of the life estate.

It sometimes has been asserted that the decisions holding that the phrase ''take effect in possession or enjoyment''

referred to the indefeasible vesting of remainders rather than to their falling in simply had overlooked or without reason disregarded a great body of state court decisions interpreting to the contrary similar language contained in various state tax laws of long standing. Judge Hand's opinion in *Frew* v. *Bowers* shows that such was not the case. Judge Hand referred to the state decisions, but he also referred to the distinction between a tax on the right to inherit or succeed to property interests and a tax on the right to transfer or transmit by death. The state statutes, being generally of the former class, might with reason be interpreted as applying to the falling in of a future interest, while at the same time the Federal statute, being of the latter class, might with equal propriety be interpreted as applying only to the indefeasible vesting of the interest out of the decedent.[2]

Thus, when *May* v. *Heiner* came before this Court in 1930, it was well understood that the key statutory phrase on which the case must turn was susceptible to two interpretations; that the weight of state authority, in applying state death taxes, had interpreted the phrase to refer to the "falling in" or the beginning of the "usufruct" of the remainder interests, but that that interpretation was not necessarily applicable to the Federal estate tax law, for the purposes of which the phrase was at least equally susceptible to being interpreted as referring to indefeasible vesting out of the decedent, as it had in fact already been interpreted in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339.

[2] The New York tax of those days was a "transfer" tax, but it was imposed separately on the interest passing to each transferee and the tax on remainders generally was postponed until they fell in. It is significant that some of the New York decisions made it clear that a transfer of a remainder subject to a reserved life estate, although taxable when it fell in, was nonetheless complete when the instrument of transfer was executed. See, for example, *Matter of Webber*, 151 App. Div. 539.

The question was fully and ably argued and after due deliberation this Court unanimously held with the latter view.

It is true that the decision came as a surprise to a segment of the bar, which perhaps merely had assumed without investigation or study that the phrase must have the same meaning under the Federal law as had been ascribed to it under various state statutes. In any event, the decision was not universally accepted. The government brought the question again before this Court in three cases decided by *per curiam* decisions on March 2, 1931. (*Burnet* v. *Northern Trust Company* and *Morsman* v. *Burnet*, 283 U. S. 782; *McCormick* v. *Burnet*, 283 U. S. 783.) Again the matter was fully argued, and the state court decisions were relied on strongly by the government. Again the decision of the Court, adhering to its former ruling, was unanimous.

In 1935, the question again came before this Court, in *Helvering* v. *Helmholz*, 296 U. S. 93. In that case the decedent had transferred property in trust in 1918 (two years after the enactment of Sec. 302(c)), reserving the income for life and a power, together with all other beneficiaries, to terminate the trust. It was contended that the transfer was taxable under Section 302(d) of the estate tax law (first enacted in 1924) as a transfer over which the decedent had reserved a power to alter, amend or revoke. This Court unanimously held that the transfer was not taxable, basing its decision on two grounds: (1) that a power in all the beneficiaries of a trust to terminate the trust was not a power to "alter, amend or revoke", and (2) that if the statute could be construed as attempting to tax the transfer, it would be unconstitutional since "the transfer was complete at the time of the creation of the trust" and "there remained no interest in the grantor".

Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo concurred in the decision only on the constitutional ground, which by necessary implication was a holding that the reservation of the income for life did not leave the transfer incomplete.

In *Hassett* v. *Welch*, 303 U. S. 303, apparently it was not contended by the government that the transfers were taxable without regard to the joint resolution of March 3, 1931 or the Revenue Act of 1932, but, in any event, the Court in deciding unanimously that neither of those enactments rendered the transfers taxable said nothing to indicate that their former decisions had lost any of their vitality.

Every one of the eleven Justices[3] who participated in any of the foregoing decisions agreed with the result, and with the opinions expressing that result.

The rulings of this Court were called specifically to the attention of Congress, which consciously and deliberately accepted them as to past transactions, while modifying them as to the future.

The congressional history surrounding the adoption of the joint resolution of March 3, 1931 and the amendment of Section 302(c) of the estate tax law by the Revenue Act of 1932 was traced fully in the respondent's brief filed in this Court by Hon. William D. Mitchell in *Helvering* v. *Marshall*.[4] There it was shown that the joint resolution was introduced and adopted, on unanimous agreement to suspend the rules, specifically because of this Court's *per*

[3] Chief Justices Hughes and Stone and Justices Holmes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Roberts, Black and Cardozo.

[4] Decided with *Hassett* v. *Welch*.

curiam decisions of the previous day reaffirming *May* v. *Heiner*. Congressional Record, Volume 74, Part 7, 71st Congress, Third Session, pp. 7076-9; 7198-9. It also was pointed out, and in this Court's decision it was held, that Congress deliberately and consciously decided to make both the joint resolution and the 1932 amendment operate prospectively only.

In this connection it is important to remember that in its three *per curiam* decisions the Court apparently had warned that any attempt to reform the statute retroactively would at least be open to constitutional doubts. In each one of the decisions, the Court in reaffirming the rule of *May* v. *Heiner* went out of its way to add: "there being no question of the constitutional authority of the Congress to impose *prospectively* a tax with respect to transfers or trusts of the sort here involved". (Emphasis supplied.)

Although Mr. Garner, speaking on the floor of the House in support of the joint resolution, said that the Committee on Ways and Means had not made the resolution retroactive because they were "afraid that the Senate would not agree to it", and expressed the hope "that the next Congress will make it retroactive", wiser counsels apparently prevailed and Congress never did take any action to "make it retroactive", probably partly in deference to this Court's constitutional warnings and its flat holding in 1935, in *Helvering* v. *Helmholz*, that such a transfer could not constitutionally be taxed retroactively.

It thus is clear that Congress did know of this Court's decisions and did reform the statute so as to prevent similar holdings as to future transactions but at the same time deliberately and consciously accepted the decisions as to past transactions.

It is submitted that it is entirely clear that neither the joint resolution of 1931 nor the 1932 amendment was "intended to be a repudiation of" the rule of *May* v. *Heiner* as to transfers completed before the adoption of the resolution.

The Treasury regulations have consistently and repeatedly acquiesced in this Court's decisions.

On May 22, 1931 the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, issued a Treasury decision to the effect that the joint resolution of March 3, 1931 should not be given retroactive application (T. D. 4314, X-1 C. B. 450).

On April 11, 1932 the Commissioner, with the approval of the Secretary, formally amended the estate tax regulations, so as to make the tax apply to any transfer made *after the adoption of the joint resolution*, under which the transferor retained a life estate (T. D. 4336, XI-1 C. B. 329).

On November 7, 1934, Estate Tax Regulations 80 were promulgated, in Article 18 of which the Treasury attempted to give retroactive application to the 1932 amendment, but not to the 1931 joint resolution. To the same effect was Article 18 of the October 26, 1937 revision of Regulations 80.

Following this Court's decision in *Hassett* v. *Welch*, and on October 24, 1938, the Commissioner, with the approval of the Secretary, amended Article 18 of Regulations 80 so as to deny any retroactive effect to the 1932 amendment, as well as to the 1931 joint resolution (T. D. 4868, 1938-2 C. B. 355).

In 1942, Regulations 80 were succeeded by Regulations 105, Section 81.18 of which also provided clearly that

neither the 1932 amendment nor the joint resolution had any retroactive application. And so the regulations of the Treasury Department have remained down until the present time.

Moreover, the question was given further intensive study by the Treasury Department when in 1946, after a full review of its regulations affecting the taxation of transfers intended to take effect in possession or enjoyment at or after death, it issued Treasury Decision 5512 (1946-1 C. B. 264) amending Section 81.17 of Regulations 105 dealing with that subject.

The amended regulation laid down the rule that a transfer should be deemed to be intended to take effect in possession or enjoyment at or after death if "(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and (2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise)". The amended regulation then stated categorically that "the decedent shall not be deemed to possess a right or interest in the property if his right or interest consists solely of an estate for his life", and the reader was directed to Section 81.18 of the regulations, referred to above, for the rules governing "the case of a life estate retained in property transferred by the decedent". Moreover, in Example (6), the amended regulation provided as follows:

> "The decedent transferred property in trust, reserving a life estate and providing succeeding life estates in his wife and son. Upon the death of the son, the principal was to be paid to the son's wife; if the son's wife did not survive her husband, to the son's issue; and if there were no issue, to the

decedent's next of kin. In this case, the decedent has parted with every right or interest in the property and hence requirement (2) is not satisfied. Accordingly, no part of the property is includible in the decedent's gross estate."

The foregoing regulation, which never has been revoked or modified, completes the picture. It makes it clear that, according to the Treasury's settled interpretation of the statute at all times since this Court's decision in *Hassett* v. *Welch* (and between the decision in *May* v. *Heiner* and the 1932 amendment), the mere retention of a life estate has not been deemed sufficient to subject a transfer made prior to March 3, 1931 to estate tax either as a transfer "intended to take effect in possession or enjoyment at or after death", or because of the provisions of the 1931 joint resolution or the 1932 amendment to Section 302(c).

There is nothing in *Helvering* v. *Hallock* which requires or justifies the overruling of *May* v. *Heiner* or *Hassett* v. *Welch*.

Certainly the Justices who joined in the dissenting opinion in the *St. Louis Union Trust Co.* cases,[5] subsequently overruled in the *Hallock* case, did not see any inconsistency between the rule of *May* v. *Heiner* and the *Hallock* rule, as they agreed with both. Nor did the Justices who participated in the three unanimous *per curiam* decisions of March 2, 1931, reaffirming *May* v. *Heiner*, since they also participated in the unanimous decision in *Klein* v. *United States*, 283 U. S. 231, on the authority of which the *Hallock* case was decided. It is submitted that those Justices were right.

[5] *Helvering* v. *St. Louis Union Trust Co.*, 296 U. S. 39; *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48.

May v. *Heiner* dealt with the reservation of the income from transferred property *during the transferor's life.* The *Hallock* case dealt with the transfer of the property interests *following the transferor's death.*

The decisions are not merely reconcilable—they are in complete harmony as to the taxation of interests in property "at or after" the transferor's death. Under each case, the test is *whether the indefeasible vesting of those interests out of the transferor is conditioned on the transferor's death.*[6]

We hesitate to refer to "vesting", lest we be accused of relying on artificial niceties of the archaic law of conveyancing. But when we couple the word with the qualifying adverb "indefeasibly", we think it cannot be doubted that we speak of real substance rather than mere form, and that we care nothing for subtle distinctions between conditions precedent and subsequent, or between reversions and mere possibilities of reverter.

For purposes of the *Hallock* rule, it is entirely immaterial whether the transferor reserved a life interest in the property transferred. The only relevant feature is the postponement until at or after the transferor's death of the determination of whether the property will return to the transferor's estate or pass to others. Whether during his life the income is paid to him or to others does not affect the question. This is made clear in the Treasury regulations (Section 81.17, Regulations 105).

That the postponement until at or after the death of the transferor of the determination of the identity of the remaindermen does not render a transfer one intended to

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[6] The same is true of the decisions following and applying the *Hallock* case, such as *Fidelity-Philadelphia Trust Company* v. *Rothensies*, 324 U. S. 108, and *Commissioner* v. *Field*, id. 113.

take effect in possession or enjoyment at or after death, so long as the possibility of the property revesting in the transferor's estate is not so postponed, was settled as long ago as 1929, in *Reinecke* v. *Northern Trust Co., supra.*

On the other hand, the rule of *May* v. *Heiner* does not mean that every transfer in which the transferor reserves a life estate is not taxable. It means only that such a transfer is not taxable if the transfer of the remainder interests following the transferor's death is not conditioned on the transferor's death through the device of postponing the indefeasible divesting of such remainder interests until at or after the transferor's death.

Concededly, the decision in the *Hallock* case necessarily implied repudiation of some of the cases which had followed *May* v. *Heiner*—cases in which not only were life interests reserved by the transferors but it also appeared that the transfers of the remainder interests were conditioned on death of the transferors. See, for example, *McCormick* v. *Burnet* and *Helvering* v. *Marshall, supra.* But cases where, although life estates were reserved, the transfers of the remainder interests were not conditioned on death of the transferors, were and should remain entirely unaffected.[7]

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[7] Not every possibility of reverter or reversionary interest, even if expressly reserved, renders a transfer taxable under Section 811(c) as a transfer intended to take effect in possession or enjoyment at or after death. For example, if the decedent made a transfer, to pay the income to A for life, with remainder to A's surviving issue, but if none, then back to the decedent, his heirs, executors, administrators and assigns, the decedent, at the time of his death, would either own the property outright (A having died without issue) or he would own the conditional right to the property if A should die thereafter without issue. Such right would pass to and become a part of the decedent's estate. Any such reversionary interest, *turning on any condition other than the transferor's death*, and being entirely unaffected by the transferor's death, is taxable, if at all, under Section 811(a), as property owned by the decedent at the time of his death, *at the date-of-death value of*

Thus the adoption of the *Hallock* rule furnished no occasion for the abandonment of the rule of *May* v. *Heiner*. Moreover, much as we always have approved and agreed with the dissenting opinions in the *St. Louis Union Trust Co.* cases and the majority opinion in the *Hallock* case, experience with the latter case has led us to wonder whether the overruling of the former was entirely fortunate or whether after all the remedy might not better have been left to Congress. It can be asserted with some confidence that Congress probably never would have adopted a rule taxing the full value of property transferred merely because of the reservation, often by accident rather than design, of a remote possibility of a future interest of no computable value. Some evidence in corroboration may be found in the provisions of Section 202 of the Revenue Revision Bill of 1948, now pending in Congress, (H. R. 6712), by which the law would be amended so as to tax only the actuarial value as of the date of death, if any, of any such future interest so reserved. In the instant case the interest had no value.

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such interest, and does not render the entire transfer taxable under Section 811(c) as a transfer intended to take effect at or after death. This distinction is fully recognized in the Treasury regulations, as amended by T. D. 5512. It is possible to have a case involving the reservation of both a life estate and a reversionary interest without thereby rendering the entire transfer taxable under Section 811(c). For example, if the decedent made a transfer in trust for the life of A, and so much longer as the decedent might live, providing that the income should be paid to the decedent during his life, and providing that on the termination of the trust the property should be paid over to certain named or described persons *if they should survive A*, otherwise to the decedent's estate, the transfer of the remainder interest following the decedent's death would not be conditioned on the decedent's death.

Conclusion.

It is now too late, in the orderly administration of justice, for this Court to overturn the rule of *May* v. *Heiner*, after both Congress and the Treasury have accepted it and taxpayers have relied on it for eighteen years.

Many transfers antedating March 3, 1931, in which the transferors reserved only life estates, have gone entirely free of estate tax. To single out now and subject to tax those estates in which the tax proceedings have not been completed would create just the kind of discrimination which the rule of *stare decisis* was designed to prevent.

Respectfully submitted,

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September, 1948.